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In the Supreme Court of the United States

OCTOBER TERM, 1978

GEORGE MARTINEZ, ET AL., APPELLANTS

v.

STATE OF CALIFORNIA, ET AL.

ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will address the following question:

Whether, with respect to the decision to release a prisoner on parole, state parole board officials are absolutely immune from liability in suits for damages under 42 U.S.C. 1983.

INTEREST OF THE UNITED STATES

Officials of the United States Parole Commission make parole determinations that are similar to the

parole determinations made by state parole board officials. In *Butz* v. *Economou*, 438 U.S. 478 (1978), this Court concluded that the immunity from liability accorded federal officials "when sued for a constitutional infringement as authorized by *Bivens* [v. *Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)]," will ordinarily parallel the immunity accorded "state officials when sued for the identical violation under [42 U.S.C.] § 1983." 438 U.S. at 500. The decision the Court renders in this case will thus foreshadow, if not actually resolve, the scope of the immunity from personal liability that is accorded to federal parole officials.

The United States has a substantial interest in participating in this case because the nature of the immunity enjoyed by federal parole officials may significantly affect the ability of such officials to perform their duties properly and effectively. In particular, the specter of personal liability in damages as a result of a decision to grant or deny parole would have an adverse impact on the operations of the federal parole system by deterring parole officials from the free and independent exercise of the discretion imposed in them by law. Because of the importance of the parole process to the effective functioning of our criminal justice system, the United States submits its view here that parole officials should be accorded an absolute imunity from personal liability with respect to their decisions to release prisoners on parole.[1]

[1] We do not address the first question presented on this appeal, which is whether the California statute that grants an absolute immunity to state parole officials from personal liability under state tort law is unconstitutional (J.S. 5). The California Court of Appeal (A. 42), the appellants (Br. 15), and the appellees (Br. 22-56, 68-69) all correctly observe that the state immunity statute is not applicable to any liability established under federal law.

Nor do we comment on the question not presented in the jurisdictional statement but briefed by both parties—whether 42 U.S.C. 1983 establishes liability for "negligent" or "reckless" conduct that causes a person to be deprived of a constitutional right (Appellants' Br. 32-35; Appellees' Br. 57-66). This issue was not raised in or considered by either court below, and there are no special circumstances warranting the court's review of the issue at this time. See, *e.g.*, *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969). The issue may be raised and considered, if necessary, on remand. Cf. *Wood* v. *Strickland*, 420 U.S. 308, 327 (1975).

For the same reasons, we also do not discuss the question briefed by appellees (Br. 14-22) but not raised in or considered by the courts below as to whether a parole release decision can be said to have "caused" (42 U.S.C. 1983) the deprivation of a constitutional right when it is alleged only that a released prisoner subsequently inflicted injury on a third person.

STATEMENT

On August 1, 1975, Richard Thomas kidnapped and murdered Mary Martinez in San Diego County, California. This crime—for which Thomas was eventually convicted and sentenced to death—was committed five months after Thomas had been released on parole from a state prison, where he had been committed after his conviction for attempted rape. At the time of Thomas' release from prison on parole, he had served five years of a one-to-twenty year sentence (A. 23).

Plaintiffs, the parents, brother and sister of Mary Martinez, filed this suit for damages in the Superior Court of San Diego County, naming as defendants the State of California and its parole officials. The complaint, as amended, alleged that the defendants were negligent and reckless in releasing Thomas on parole, in failing to comply with state parole procedures in the decision to release Thomas, in failing to supervise Thomas after his release, and in failing to warn females in the Tecolote Canyon area of San Diego County of Thomas' release (A. 22-28).[3] Plaintiffs also alleged that the defendants, acting under color of state law, by their negligent, malicious and reckless conduct in releasing Thomas on parole, caused the deprivation of Mary Martinez' life without due process of law, in violation of 42 U.S.C. 1983. Plaintiffs sought $1,000,000 in compensatory damages for loss of the "care, comfort, support, protection and society" (A. 24) of Mary Martinez and also sought $1,000,000 in punitive damages (A. 28, 29, 31).

The defendants demurred to the complaint on the ground that it failed to state a cause of action. The superior court sustained the demurrer, and the state court of appeal affirmed (A. 16-18, 35-37, 38-44).

[3] Plaintiffs eventually conceded on appeal that their claim premised upon the defendants' failure to warn females of Thomas' release "should be dismissed because there was no continuing relationship between the State and the victim" (A. 41).

The court of appeal held that appellants' claims seeking relief under state law are barred by California Government Code 845.8(a), which provides an absolute immunity from liability for parole officials with respect to "[a]ny injury resulting from determining whether to parole or release a prisoner * * *." The court rejected appellants' contention that the state statute is unconstitutional, noting that the legislaure has broad authority to determine governmental tort liability. The court emphasized (A. 44) that the legislative determination to provide an absolute immunity for parole officials is rational, because

> [t]o impose tort liability would have a chilling effect on the decision making process, impede implementation of trial release programs and prolong incarceration unjustifiably for many prisoners.

The court also held that parole officials "are performing quasi-judicial functions when they make determinations regarding parole" and are therefore entitled to an absolute immunity from liability under 42 U.S.C. 1983 for parole release decisions (A. 42).

ARGUMENT

PAROLE OFFICIALS ARE ABSOLUTELY IMMUNE FROM PERSONAL LIABILITY IN DAMAGES BASED UPON DECISIONS TO GRANT OR DENY PAROLE

Introduction and Summary

In *Butz* v. *Economou*, 438 U.S. 478, 508 (1978), this Court held that, "[a]lthough a qualified immunity from damages liability should be the general

rule for executive officials charged with constitutional violations, * * * there are some officials whose special functions require a full exemption from liability." As we show in Part B below, "the special nature of th[e] responsibilities" (*id.* at 511) imposed on parole officials requires that they be accorded an absolute immunity from damages liability with respect to their decisions to grant or deny parole.

As with the functionally comparable responsibilities of judges, prosecutors and juries within the criminal justice system (see *Imbler* v. *Pachtman*, 424 U.S. 409, 423 n.20 (1976)), the difficult process of evaluating an offender's suitability for parole cannot effectively be performed under the specter of claims of personal liability. Absolute immunity for decisions to grant or deny parole is necessary to ensure that the discretion of parole officials is not distorted by the threat of personal litigation (*Butz* v. *Economou*, *supra*, 438 U.S. at 515) and to ensure that these officials "can perform their * * * functions without harrassment or intimidation" (*id.* at 512). For parole officials—as for sentencing judges, prosecutors and juries—the minimal risk of intentional misconduct is clearly outweighed by the importance to the criminal justice system of preserving "the independent judgment of these men and women" (*id.* at 514).

To place this discussion within its proper context, we first describe the nature of the parole process within the federal criminal justice system.

A. Federal Parole Officials Perform A Quasi-Judicial Responsibility In Determining Whether Individual Prisoners Should Be Released On Parole

1. The United States Parole Commission is an independent agency established by Congress within the Department of Justice. 18 U.S.C. 4202. Its nine members are appointed by the President, with the advice and consent of the Senate, to serve six-year terms. *Ibid.* The Commissioners are empowered to grant or deny parole for any eligible prisoner, to impose reasonable conditions on parole should it be granted, and to modify or revoke any order granting parole. 18 U.S.C. 4203(b). These powers are exercised pursuant to rules and guidelines adopted by the Commission. 18 U.S.C. 4203(a)(1). See 28 C.F.R. 2.20 *et seq.*

Although parole "originated as a form of [executive] clemency" (S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 19 (1976)), "the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system." *Morrissey* v. *Brewer*, 408 U.S. 471, 477 (1972). In the federal criminal justice system, "parole is a key factor because most Federal prisoners become eligible for parole, and approximately 35 percent of all Federal offenders who are released are released on parole." S. Conf. Rep. No. 94-648, *supra*, at 19. In fiscal year 1978, for example, the United States Parole Commission considered 23,180 cases concerning the grant or revocation of parole. *Report of the United States Parole Commission* 17

(1978). In connection with these cases, the Commission through its parole examiners conducted 18,633 personal hearings, released 7,470 prisoners on parole, and issued 2,574 orders revoking parole. *Id.* at 15-17, 18.

In 1976, in recognition of the burgeoning, complex caseload of required parole decisions, Congress enacted the Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219, 18 U.S.C. 4201 *et seq.* The objective of the Act is "to assure the public and imprisoned inmates that parole decisions are openly reached by a fair and reasonable process after due consideration has been given the salient information." S. Conf. Rep. No. 94-648, *supra*, at 20. To accomplish this objective, the Act establishes both substantive and procedural responsibilities for the Commission in its parole decision making process.

In the particular context of parole release decisions,[3] the Act provides that a prisoner eligible for parole[4] shall be released if the prisoner "has substantially observed the rules of the institution" (18 U.S.C. 4206(a)) and

> if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:
>
> (1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and
>
> (2) that release would not jeopardize the public welfare * * *.

Ibid.[5] This determination is to be made for each prisoner pursuant to guidelines adopted by the Commission (*ibid.*), although "[t]he Commission may grant or deny release on parole notwithstanding the guidelines * * * if it determines there is good cause for so doing." 18 U.S.C. 4206(c).

Pursuant to this statutory directive, the Commission has promulgated guidelines that provide objec-

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[3] Because this case arises from a parole release decision, rather than a parole revocation or conditional release decision, this discussion will focus on the Commission's procedure in reaching release decisions under 18 U.S.C. 4206. We note, however, that the quasi-judicial nature of the Commission's decision making process extends to parole revocation decisions under 18 U.S.C. 4214 and to conditional release decisions under 18 U.S.C. 4209.

[4] The time at which a prisoner first becomes eligible for parole is determined by the choice of sentencing options made by the sentencing court. See, *e.g.*, 18 U.S.C. 4205(a), (b); 18 U.S.C. 4216; 18 U.S.C. 4251-4255. See *United States* v. *Addonizio*, No. 78-156 (June 4, 1979), slip op. 10 & n.15. But "[t]he decision as to when a lawfully sentenced defendant shall actually be released on parole has been committed by Congress, with certain limitations, to the discretion of the Parole Commission." *Ibid.* See also *id.* at 10 n.13.

[5] If a prisoner has been sentenced to a term of imprisonment in excess of five years, he is entitled to be released on parole at the expiration of two-thirds of each consecutive term or 30 years, whichever is earlier, unless the Commission determines that the prisoner "has seriously and frequently violated institution rules" or that there is a reasonable probability that he would commit further crimes. 18 U.S.C. 4206(d). See *United States* v. *Addonizio*, *supra*, slip op. 10 n.13.

tive standards for the application of its broad discretionary authority in granting parole. 28 C.F.R. 2.20.[6] The objective of the guidelines is to "promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration * * *" (28 C.F.R. 2.20(a)).[7] See also *United States* v. *DiRusso*, 535 F.2d 673, 674 (1st Cir. 1976). Consistent with this objective, the guidelines are not inflexible. For each of six general categories of offense severity (*e.g.*, "high" or "low" severity), subdivided into four categories based on offender characteristics (*e.g.*, "good" or "poor" parole prognosis), the guidelines indicate a broad, customary range of confinement to be served by persons with good institutional behavior.[8] 28 C.F.R. 2.20(b). Moreover, the guidelines do not establish customary ranges of confinement for every conceivable offense; instead, they provide several examples of offenses within each severity level. 28 C.F.R. 2.20(d). See *Garcia* v. *United States Board of Parole*, 557 F.2d 100, 106 & n.6 (7th Cir. 1977). Mitigating or aggravating circumstances relating to the offense of a particular prisoner, as well as the prisoner's institutional performance, may justify a decision to release a prisoner outside the guidelines' range of customary release dates.[9] 28 C.F.R. 2.20(c), (d), (e). The Commission has generally reserved discretion to depart from the guidelines whenever it concludes that the circumstances of the particular prisoner's case so warrant. 28 C.F.R. 2.18, 2.20(c).

Individual case consideration is an essential component of the federal parole system because the Commission must, in each case, scrutinize the particular circumstances of the prisoner and his offense to determine how, if at all, the guidelines are to be applied

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[6] The federal parole guidelines are described at length in the government's brief in *United States Parole Commission* v. *Geraghty*, No. 78-572 (Br. 51-88), which presents a challenge to the validity of the guidelines under the Parole Commission and Reorganization Act and the Constitution. We are supplying appellants and appellees with a copy of our brief in *Geraghty*.

[7] See Hoffman and DeGostin, *Parole Decision-Making: Structuring Discretion*, 38 Fed. Prob. 9 (Dec. 1974):

> By providing a specific policy range and requiring a written explanation for each decision outside this range, the guidelines endeavor to structure discretion without removing it, and thus permit more rational and consistent decisionmaking.

[8] The Commission utilizes a separate set of guidelines in determining whether prisoners should be reparoled after parole has been revoked for administrative violations of parole conditions not involving new criminal conduct. 28 C.F.R. 2.21(a), 2.34(g)(1).

[9] Factors suggested by Congress as justifying a parole release determination above the guidelines were "whether or not the prisoner was involved in an offense with an unusual degree of sophistication or planning, or has a lengthy [prison] record, or was part of a large scale conspiracy or continuing criminal enterprise." On the other hand, a decision below the guidelines might be justified by such factors as "a prisoner's adverse family or health situation." S. Conf. Rep. No. 94-648, *supra*, at 27; H.R. Conf. Rep. No. 94-838, 94th Cong., 2d Sess. 27 (1976).

to him.[10] If the guidelines are found applicable to the prisoner, the Commission must then establish a precise release date within the broad range of customary release dates (*e.g.*, 26-36 months) indicated by the guidelines. If the guidelines are found inapplicable, the Commission must determine what release date, if any, is appropriate on the basis of the particular facts of the prisoner's case. The extensive nature of these individual parole inquiries is illustrated by the fact that, in 1978, approximately 11% of the 13,957 individual decisions to release prisoners on parole deferred the date of release beyond the guideline range. During this same period, approximately 10% of the Commission's decisions granted release before the guideline range. *Report of the United States Parole Commission, supra,* at 15, 19.

Several procedural requirements were enacted in the Parole Commission and Reorganization Act to ensure the fairness of the Commission's parole release decisions.[11] Before the Commission may con-

[10] A prisoner whose personal history and offense are such that he would ordinarily be released within the guideline range may be removed from guideline consideration because of poor institutional performance. In emphasizing that "the Parole Commission [should] reach a judgment on the institutional behavior of each prospective parolee * * *" (S. Conf. Rep. No. 94-648, *supra,* at 25), Congress stated that "an understanding by the prisoner of the importance of his institutional behavior is crucial to the maintenance of safe and orderly prisons." *Ibid.*

[11] Congress enacted the procedural requirements set forth in *Morrissey* v. *Brewer, supra,* for parole revocation proceedings. 18 U.S.C. 4214(a). Similar procedures were adopted

sider a prisoner for parole, the prisoner must be given advance notice of his parole hearing and access to any "report or other document to be used by the Commission in making its determination." 18 U.S.C. 4208(b).[12] Parole examiners are appointed by the Commission to conduct individual parole hearings and to recommend decisions to the Commission. 18 U.S.C. 4203(c)(1). The prisoner is entitled to be represented at the parole hearing and to appear and testify on his own behalf. 18 U.S.C. 4208(d), (e). In each parole release decision, the Commission is directed to consider the reports and recommendations provided to the Commission by the prison staff and the sentencing court, as well as "such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available." 18 U.S.C. 4207.

If parole is denied, the prisoner is entitled to a written statement of "the reasons for such denial" (18 U.S.C. 4206(b); see also 18 U.S.C. 4206(c)) and a "full and complete record of [the] proceeding * * *" (18 U.S.C. 4208(f)). If the parole examiner recommends that parole be denied, the prisoner may apply for reconsideration by the regional commissioner. 18 U.S.C. 4215(a). If the regional commis-

for the determination the Commission must make after a prisoner has been paroled for five years (18 U.S.C. 4211(c)(1)) whether to terminate parole supervision. 18 U.S.C. 4214(a)(2). See also 18 U.S.C. 4209(d)(1) (requiring notice and an opportunity to be heard before conditions of release may be modified during the period of parole supervision).

[12] Limited exceptions to the disclosure requirement are set forth in 18 U.S.C. 4208(c).

sioner also denies the request for parole, the prisoner may appeal that decision to the three commissioners appointed by the Chairman of the Commission to sit as the National Appeals Board. 18 U.S.C. 4215(b); see 18 U.S.C. 4204(a)(5). Although the decision of the National Appeals Board to grant or deny parole is expressly excepted from review under the Administrative Procedure Act as action "committed to agency discretion" by law (18 U.S.C. 4218(d); see 5 U.S.C. 701(a)(2)), prisoners have obtained a form of judicial review of parole decisions in habeas corpus proceedings, in which the denial of parole is upheld if there is a "rational basis" for the Commission's determination. See, *e.g.*, *Zannino* v. *Arnold*, 531 F.2d 687, 691 (3d Cir. 1976).

2. The decisional processes of federal parole commissioners and parole examiners are "functionally comparable" to the quasi-judicial responsibilities performed by a "modern federal hearing examiner or administrative law judge." *Butz* v. *Economou*, *supra*, 438 U.S. at 513. In each parole release decision, the Commission is required to make factual determinations concerning the nature of the prisoner and his offense and whether release would "jeopardize the public welfare" or "depreciate the seriousness" of the crime.[13] 18 U.S.C. 4206(a); see also 18 U.S.C.

[13] Although the Parole Commission has adopted an objective system of policy guidelines to structure the exercise of its discretion in making its parole release decisions, 28 C.F.R. 2.20, the Commission's discretion, "though more structured, is still quite broad." *Payton* v. *United States*, 468 F. Supp. 651, 655 n.5 (S.D. Ala. 1979). The guidelines serve as a reference point from which the Commission must analyze each case. 18 U.S.C. 4206(c). But the weight to be given to individual factors considered in the process, and the final determination as to whether a decision should be made above, below or within the guidelines (and at what point within the guidelines), is a judgment made by the Commission's officials upon consideration of all of the facts and circumstances presented in each individual case. S. Conf. Rep. No. 94-648 *supra*, at 28.

4206(c). These determinations are made in a formal proceeding in which the prisoner "is entitled to present his case by oral or documentary evidence." *Butz* v. *Economou*, *supra*, 433 U.S. at 513. When a decision is made, the prisoner is entitled to receive a written set of findings and a transcript of the record (*ibid.*). Because the decisions of the Commission and its examiners are not reviewable within the Executive Branch, they are effectively "insulated from political influence." *Ibid.* Moreover, the prisoner may obtain a form of judicial review of the Commission's decision in habeas corpus proceedings in the district courts.[14] *Zannino* v. *Arnold*, *supra*.

The decision made by parole officials to release a prisoner on parole is also closely analogous to the decision made by a sentencing court to place a convicted offender on probation. See *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, No. 78-201 (May 29, 1979), slip op. 13;

[14] It may also be possible in some circumstances for a prisoner to obtain a writ of mandamus under 28 U.S.C. 1361 to compel the performance of a duty owed him by federal parole officials. See *Smith* v. *United States*, 577 F.2d 1025 (5th Cir. 1978).

Thompson v. *Burke*, 556 F.2d 231, 238 n.13 (3d Cir. 1977); *Pate* v. *Alabama Board of Pardons and Paroles*, 409 F. Supp. 478, 479 (M.D. Ala. 1976), aff'd, 548 F.2d 354 (5th Cir. 1977). Both types of decisions involve "a synthesis of record facts and personal observation filtered through the experience of the decision maker and leading to a predictive judgment as to what is best both for the individual inmate and for the community." *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, *supra*, slip op. 6. As the Chief Justice stated in *Hyser* v. *Reed*, 318 F.2d 225, 236 (D.C. Cir.) (footnote omitted), cert. denied, 375 U.S. 957 (1963):

> While there are distinguishing factors between probation and parole, the underlying purposes are closely allied. In each the entity which grants is the entity which is empowered to revoke. In each situation the revoking authority is being exercised pursuant to explicit statutory authority. Moreover that power is being exercised by a person or persons experienced in sifting and weighing evidence and evaluating the factors involved in the grant or revocation of conditional freedom.

See also *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 n.3 (1973). Thus, in determining whether to grant parole, parole officials are to act with the same latitude exercised by the sentencing court in considering all aspects of the offender's character, personal history and criminal conduct. *Billiteri* v. *United States Board of Parole*, 541 F.2d 938, 944 (2d Cir. 1976).

Because of the close similarity between the function of parole and probation within our criminal

justice system and the quasi-judicial nature of the parole decision making process, several courts of appeals have concluded that parole officials are entitled to the same absolute immunity from personal liability in parole decisions that is accorded to the similar exercise of authority by sentencing courts. See, *e.g.*, *Douglas* v. *Muncy*, 570 F.2d 499, 501 (4th Cir. 1978); *Johnson* v. *Wells*, 566 F.2d 1016, 1018 (5th Cir. 1978); *Thompson* v. *Burke*, *supra*, 556 F.2d at 238 n.13.[15] As we show below, this conclusion is supported by the decisions of this Court.

B. Parole Officials Are Entitled To An Absolute Immunity From Personal Liability In The Exercise Of Their Quasi-Judicial Responsibility To Grant Or Deny Release On Parole

The special nature of the responsibility imposed on federal parole officials by law (see *Butz* v. *Economou*, *supra*, 438 U.S. at 508, 511) requires that they be accorded an absolute immunity from personal liability

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[15] See also *Lang* v. *Wood*, 92 F.2d 211, 212 (D.C. Cir. 1937); *Pate* v. *Alabama Board of Pardons and Parole*, *supra*. The Eighth Circuit reserved decision on this issue in *DeShields* v. *United States Parole Commission*, 593 F.2d 354 (1979).

Probation officials who assist the sentencing court by the preparation of presentence reports also have been held absolutely immune from personal liability because the presentence report "is an integral part of the sentencing process" and is performed "at the direction of the court." *Spaulding* v. *Nielson*, 599 F.2d 728, 729 (5th Cir. 1979). See also *Burkes* v. *Callion*, 433 F.2d 318 (9th Cir. 1970).

with respect to decisions granting or denying parole.[16] Absolute immunity for the quasi-judicial responsibility performed by parole officials is "justified since it would * * * sufficiently increase the ability of [parole] officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for [persons] subjected to intentional or otherwise inexcusable deprivation[]," *Wood* v. *Strickland*, 420 U.S. 308, 320 (1975).[17] The reasons that have led this Court to accord an absolute immunity from personal liability to judges, prosecutors and jurors participating in the criminal justice system (see *Imbler* v. *Pachtman*, 424 U.S. 409, 422-423 (1976)) are equally applicable to the functions performed by parole officials.

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[16] Our discussion in this brief focuses on the responsibilities of federal parole officials who, like the state officials involved in this case, must engage in highly discretionary quasi-judicial decisionmaking as part of a formal parole process. Parole systems in which the parole board's role is essentially ministerial or in which the release criteria leave little room for discretion would present different questions concerning the scope of the applicable immunity from damage suits.

[17] The scope of the immunities afforded to officials under 42 U.S.C. 1983 is to be determined by common-law principles. *Wood* v. *Strickland*, *supra*, 420 U.S. at 317, 318; *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967). The statute did not abolish or limit the judicial development of the common law doctrines of immunity. *Butz* v. *Economou*, *supra*, 438 U.S. at 496, 508. Stated in its broadest terms, the common law affords an absolute immunity where it is required by "public policy" and "is essential for the conduct of the public business." *Id.* at 506, 507.

1. As with the prosecutor contemplating the initiation of criminal proceedings or the court imposing sentence, "[t]he public trust [placed in a parole official] would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." 424 U.S. at 424-425. The parole decision serves a central function in the administration of criminal justice (see *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 474) and involves difficult, complex "assessment[s] of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done." *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, *supra*, slip op. 8, quoting Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803, 813 (1961). The difficult, predictive judgment made by parole officials is thus "much like a sentencing judge's choice" (slip op. 13). Exposing either the sentencing judge or parole officials to a civil suit for damages "would seriously cripple" (*Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896)) the administration of criminal justice by threatening the freedom and independence of these decision makers. See *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871).

In determining whether to grant parole, the parole officials must consider not only society's interest in just punishment and public safety, but also the interest in rehabilitation and reentry of the prisoner into useful social life. Parole decision makers should

not be made to choose between prolonging the incarceration of a prisoner who is a proper candidate for parole or releasing the prisoner at the risk of subsequent personal liability (or at least time-consuming, costly and disruptive litigation). The parole system would not function effectively if parole officials had to decide in each parole determination whether to fulfill their duty or protect their self-interest; the discretion imposed in them by law "might be distorted if their immunity from damages arising from that decision was less than complete." *Butz* v. *Economou, supra,* 438 U.S. at 515.[18] See also *Pierson* v.

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[18] The court in *Pate* v. *Alabama Board of Pardons and Paroles, supra,* 409 F. Supp. at 479 & n.1, correctly observed that:

> Parole officials bear a more than ordinary responsibility because of the dangerous traits already demonstrated by those with whom they must deal. This responsibility imposes far greater moral burdens and requires far more difficult legal choices that those met by the average administrative officer. The function of the Parole Board is more nearly akin to that of a judge in imposing sentence and granting or denying probation than it is to that of an executive administrator. It is essential to the proper administration of criminal justice that those who determine whether an individual shall remain incarcerated or be set free should do so without concern over possible personal liability at law for such criminal acts as some parolee will inevitably commit; in other words, that such officials should be able to exercise independent judgment without pressure of personal liability for acts of the subject of their deliberations.
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> The system of rehabilitation practiced in this country, involving probation, parole, and pardon, could not be effective if those burdened with the decisions incident thereto were subjected to personal liability for mistakes, the occurence of which is inherent to the system.

Ray, 386 U.S. 547, 554 (1967) (suits by dissatisfied litigants against judges "would contribute not to principled and fearless decision-making but to intimidation").

2. As with judges and prosecutors, suits challenging the decision of parole officials "could be expected with some frequency * * *." *Imbler* v. *Pachtman, supra,* 424 U.S. at 425. See *Bradley* v. *Fisher, supra,* 80 U.S. (13 Wall.) at 354. The Parole Commission disposes of thousands of cases annually in the regular course of its legal duties. See page 8, *supra.* Each of these decisions requires an assessment of the likelihood that the prisoner may engage in dangerous behavior in the future, an assessment that is necessarily tentative and subject to error. As this Court emphasized in *Greenholtz* (slip op. 11):

> No ideal, error-free way to make parole release decisions has been developed; the whole question has been and will continue to be the subject of experimentation involving analysis of psychological factors combined with fact evaluation guided by the practical experience of the parole decision makers in predicting future behavior.

It therefore reasonably can be anticipated that numerous parole decisions each year will result either in resentment by prisoners who are denied parole or in anger or frustration by third parties who are injured in their persons or property by prisoners who were released on parole. See *Butz* v. *Economou, supra,* 438 U.S. at 512 ("[t]he loser in one forum will frequently

seek another, charging the participants in the first with unconstitutional animus").[19]

In these instances, the "allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into [parole officials] would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence." *Bradley* v. *Fisher*, *supra*, 80 U.S. (13 Wall.) at 354. As with sentencing judges and prosecutors, if parole officials were entitled to only a qualified immunity and were required to prove in each case that they had rendered their decision in good faith (see *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-248 (1974)), it would often be difficult for them to explain the necessarily subjective and complex proc-

[19] The problem of recidivism remains, of course, unsolved in our criminal justice system. The Parole Commission's evaluation of parole prognosis for individual prisoners has proven empirically significant in predicting the risk of recidivism and is thus helpful in determining whether a prisoner's release "[will] jeopardize the public welfare." 18 U.S.C. 4206(a)(2). See generally Hoffman, Meierhoffer and Beck, *Salient Factor Score and Release Behavior: Three Validation Samples*, 2 L. and Human Behavior 47-62 (1978); Hoffman and Beck, *Salient Factor Score Validation—A 1972 Release Cohort*, 4 J. of Crim. Just. 69-76 (1976); Hoffman and Beck, *Parole Decision-Making: A Salient Factor Score*, 2 J. of Crim. Just. 195-206 (1974). But neither this device, nor the Commission's ultimate judgment of parole risk, which must be made upon a consideration of all of the circumstances in each case, is foolproof. See *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, *supra*, slip op. 11. Nothing in the parole legislation enacted by Congress, however, suggests that parole officials are to stand as an insurer for the acts of persons released on parole.

esses of their decisions. Objective factual evidence may play only a small role in a particular parole determination yet may weigh heavily in a jury's assessment of the good faith of the parole officials. Moreover, requiring parole officials to defend their motives in rendering thousands of parole decisions annually, in civil proceedings initiated perhaps several years after the decisions are made, would impose an intolerable burden that could discourage qualified persons from assuming this public responsibility and hinder the free exercise of their independent judgment. See *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 425-426. An absolute immunity for parole officials is thus necessary to preserve "the vigorous and fearless performance of [a] duty that is essential to the proper functioning of the criminal justice system." *Id.* at 427-428.

3. An absolute immunity of parole officials from liability for parole decisions would "not leave the public powerless to deter misconduct * * *." *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 429. A prisoner who is denied parole has ample means to curb abuse in official action, both by invoking the Commission's internal appellate procedures and (in appropriate circumstances) by seeking a writ of habeas corpus in federal court. See pages 13-14 and note 14, *supra*. There are, moreover, independent checks that minimize the risk that an intentional deprivation of the rights of third persons will occur. As with state prosecutors and judges, the willful deprivation of constitutional rights by state parole officials could

subject them to criminal liability under 18 U.S.C. 242. See *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 429. In addition, the parole decision is often made in a collegial context,[20] which minimizes the possibility of intentional, individual misconduct. And, to the extent that civil and criminal remedies are available to punish a criminal at the instance of the victim, those remedies remain available to afford some redress against released prisoners for the crimes they commit while on parole.

This Court has, in any event, never held that absolute immunity from liability is appropriate only if constitutional deprivations will not occur. See *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 427.[21] To the contrary, the Court has recognized that even though

[20] See, *e.g.*, 18 U.S.C. 4215(b) (review by three-member National Appeals Board).

[21] Nor has the Court held that absolute immunity is available only in the context of fully adversary proceedings. See, *e.g.*, *Stump* v. *Sparkman*, 435 U.S. 349, 363 n.12 (1978). The decision to prosecute or to indict is not made in an adversary proceeding. The interests of third parties in the prosecution of a criminal are no more directly represented before a prosecutor than are the interests of similar persons before parole officials. Yet the prosecutor is absolutely immune from personal liability with respect to his decision to prosecute, *or not to prosecute*, for any particular offense. *Imbler* v. *Pachtman*, *supra*. A decision not to prosecute (like a decision to grant parole) is not reviewable in any adversary judicial proceeding. Similarly, the decision of a sentencing court to place a convicted offender on probation, rather than in prison, or to sentence him to a lesser rather than a greater term of imprisonment, is not reviewable by third parties in any adversary proceeding. Yet the judge is absolutely immune from liability for his sentencing decision.

some risk of unconstitutional conduct may exist, it "would disserve the broader public interest" for the threat of personal damages to obstruct the effective functioning of the federal criminal justice system. *Ibid.* For parole officials—as for sentencing judges, prosecutors and juries—the minimal risk of intentional misconduct is clearly outweighed by the importance to the criminal justice system of assuring that these officers "can perform their * * * functions without harrassment or intimidation." *Butz* v. *Economou*, *supra*, 438 U.S. at 512. Because the objectives of criminal justice implemented within the parole system require that "the independent judgment of these men and women" (*id.* at 514) be preserved, parole officials should be absolutely immune from personal liability in suits challenging parole decisions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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